No. 456, 507, 501, 502, 509, 515.

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JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

Argument of Atty. Gen.

Filed Jan. 10, 1891.

ELIAS S. A. DE LIMA ET AL., PLAINTIFFS in error,
v.
GEORGE R. BIDWELL. } No. 456.

SAMUEL B. DOWNES ET AL., PLAINTIFFS in error,
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HENRY W. DOOLEY ET AL., PLAINTIFFS in error,
v.
THE UNITED STATES. } No. 501.

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v.
THE UNITED STATES. } No. 502.

CARLOS ARMSTRONG, APPELLANT,
v.
THE UNITED STATES. } No. 509.

GEORGE W. CROSSMAN ET AL., APPELLANTS.
v.
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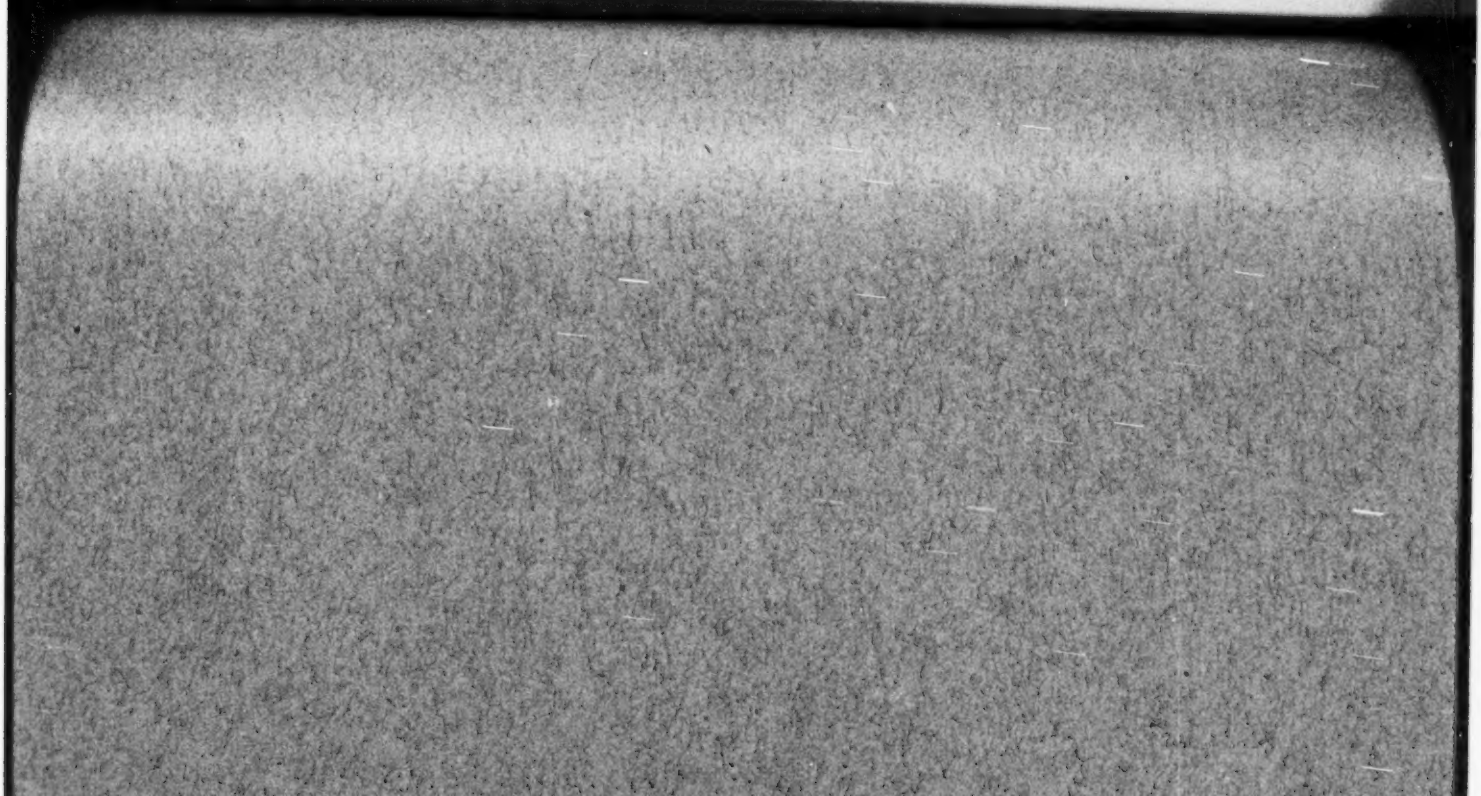
ARGUMENT OF THE ATTORNEY-GENERAL FOR THE UNITED STATES.



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ARGUMENT OF THE ATTORNEY-GENERAL FOR THE UNITED STATES.

The remarks hereby submitted are intended to be supplemental to the argument addressed to the court

by the Attorney-General on behalf of the United States in the Goetze case and the case of Fourteen Diamond Rings, and relate more especially to the construction of the clause of the Constitution which requires duties, imposts, and excises to be uniform throughout the United States.

The cases now under discussion involve the constitutionality of the revenue provisions of the Porto Rico act and the special tariff clause of the resolution of annexation of Hawaii.

The brief filed on behalf of the appellant in the case of *Armstrong* v. *United States* contains so many erroneous statements of the view and position which the Attorney-General has taken on behalf of the United States upon this question that I feel it necessary to point out these misapprehensions.

For instance, on page 30 of their brief, it is said:

> The Attorney-General, in his brief in the Goetze case, contends that the ordinary and necessary sovereign powers of an independent nation demand an unlimited hand in the government of territory outside of the States of the American Union; that but for this unlimited power this Government would not be able to exercise the functions of an independent nation.

Counsel further, in their brief, declare that "Congress is omnipotent nowhere on the face of the earth" (p. 31).

"Despotic power and omnipotence are not among the prerogatives of the President or the Congress, or of both together" (p. 32).

"He (the Attorney-General) reduces territorial possessions to mere property, and declares that the inhabitants thereof have no rights which an independent government is bound to respect" (p. 32).

"In short, he contends that monarchical powers must be possessed by all independent governments; that such powers are absolutely necessary to the performance of the duties of independent government—in other words, that our Government, instead of being 'the land of the free,' is the most unlimited of despotisms."

"To sustain the position taken by the Government in denying to the new possessions a United States status, the Government of the United States must be a despotism as to all territory outside of the States."

"Congress is no more supreme in the Territories than it is in the States, in fact (p. 35)."

The consequences of the contention of the Government are stated to be: "That the Congress of the United States and the President in their treatment of the people of these places are not operating under the Constitution" (p. 37).

In the Goetze case I referred to the undisputed contention of the appellants that "The Government of the United States is one of delegated powers and that its powers are not absolute and untrammeled, but subject to certain limits never and nowhere to be transcended." I stated the position of the Government to be that the United States has been vested, not with all powers, but only with certain particular powers. These particular delegated powers are in some respects limited and

confined in scope and operation, but in other respects they are entirely unlimited. I asserted that the contention of the Government did not imply the possession by Congress of all unlimited and despotic powers in the government of territory. I declared that in this respect nothing further was meant or intended by the Attorney-General than was meant by this court when it declared the power of Congress over the Territories to be general and plenary, or when it declared, through Mr. Justice Bradley, in the Mormon Church case, that "In legislating for the Territories Congress would doubtless be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments, but these limitations would exist rather by inference and the general spirit of the Constitution than by any express and direct application of its provisions."

I beg to call attention to all that was said by me in that brief upon this subject. See brief in Goetze case, page 10, etc.

We plant ourselves upon the principle announced by this court in the Mormon Church case. Do our opponents dispute its soundness or not? We claim no more and no less than the power there conceded.

If that be despotism, then despotism has acquired a new meaning.

INDIRECT TAXES NEED NOT BE UNIFORM THROUGHOUT "THE TERRITORY" OF THE UNITED STATES.

The Constitution has not provided for absolute uniformity of duties under all circumstances.

States may still impose imposts and duties on imports

and exports and duty of tonnage, provided Congress consent thereto. (Constitution, Art. I, sec. 10, pars. 2 and 3.)

The uniformity clause of the Constitution refers to the States and not to Territories.

(*a*) The historical reasons for its insertion into the Constitution prove this.

(*b*) The phrase "throughout the United States" elsewhere used in the Constitution refers only to the States.

Article I, section 8, paragraph 4; Article II, section 1, paragraph 3. See *Sturges* v. *Crowninshield* (4 Wheat., 122).

Similar meanings should be attached to the same phrase wherever it occurs unless some different meaning is clearly indicated by the context.

(*c*) The power to tax within the limits of territory is not derived from article 1, section 8, paragraph 1, but from the general power to make all needful rules and regulations respecting the territory belonging to the United States.

(*d*) The States, by the compact of submission to the Government organized under the Constitution, were to stand on a perfect equality with each other. The Congress was forbidden to exercise any discrimination between the States or their several ports.

As to the Territories no such compact was made. The full power of taxation was conferred on Congress along with the power to govern them; and in the exercise of the power Congress possesses unrestricted

discretion both as to the subjects of taxation and the places where it shall be levied and those where it shall not be levied.

As between the different Territories there is no compact in favor of uniformity. Such uniformity is not essential for the protection of the States as between each other, because the Territories are the common property of all of the States, and whatever is done as to Territorial taxation is done by the authority of the States and for their equal benefit.

(*e*) There are obvious reasons of prudence and policy for not requiring the revenue laws, which must be uniform throughout the States, to be uniform also throughout the Territories.

This is expressly decided to be so as to direct taxes. (*Loughborough* v. *Blake.*) For the same reasons, and for other reasons as well, the same is true as to indirect taxes.

The internal revenue, or tariff, or license laws, made for the States, may be inconvenient, oppressive, unprofitable, impolitic, for the Territories. Those laws may be wise and politic for some and very unwise and impracticable for other Territories.

Congress ought to possess, and we contend does possess, the power to vary its system of taxation according to the location, conditions, and circumstances of the different territories.

Otherwise not only will the Government be embarrassed and hampered, but actual injustice will be done to some sections of our possessions.

(*f*) It is conceded that Congress has such power to vary the system of taxation for local purposes.

But in principle and in reality there is no difference between local taxation and general taxation upon territorial property.

There were reasons why the limits of taxation upon the States should be fixed by the Constitution.

Equality between the States was the prime and most evident object to be attained. To that end were established the rule of apportionment as to direct taxes and the rule of conformity throughout all the States as to duties, imposts, and excises.

Story, answering the question why "duties, imposts, and excises" are required to be uniform throughout the United States, says:

> The answer to the latter may be given in a few words. It was to cut off all undue preferences of one State over another in the regulation of subjects affecting their common interests. Unless duties, imposts, and excises were uniform, the grossest and most oppressive inequalities, vitally affecting the pursuits and employments of the people of different States, might exist. The agriculture, commerce, or manufactures of one State might be built up on the ruins of those of another; and a combination of a few States in Congress might secure a monopoly of certain branches of trade and business to themselves, to the injury, if not to the destruction, of their less-favored neighbors. The Constitution, throughout all its provisions, is an instrument of checks and

> restraints, as well as of powers. It does not rely on confidence in the General Government to preserve the interests of all the States. It is founded in a wholesome and strenuous jealousy, which, foreseeing the possibility of mischief, guards with solicitude against any exercise of power which may endanger the States, as far as it is practicable. If this provision as to uniformity of duties had been omitted, although the power might never have been abused to the injury of the feebler States of the Union (a presumption which history does not justify us in deeming quite safe or certain), yet it would, of itself, have been sufficient to demolish, in a practical sense, the value of most of the other restrictive clauses in the Constitution. New York and Pennsylvania might, by an easy combination with the Southern States, have destroyed the whole navigation of New England. A combination of a different character, between the New England and the Western States, might have borne down the agriculture of the South; and a combination of a yet different character might have struck at the vital interests of manufacturers. (2 Story on Constitution, sec. 957.)

He discusses the cognate clauses of the Constitution relating to taxation by the States, showing that all of those clauses are a part of one and the same system and have the same object, viz, the regulation of taxes within the States and by the States. "No State shall, *without the consent of Congress*, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws;

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and the net produce of all duties and imposts laid by any State on imports and exports shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of Congress. No State shall, without the consent of Congress, lay any tonnage duty." In the first draft of the Constitution the clause stood: "No State, without the consent," etc., "shall lay imposts or duties on imports." The clause was then amended by adding "or exports," not, however, without opposition, six States voting in the affirmative and five in the negative; and again, by adding "nor with such consent, but for the use of the Treasury of the United States," by a vote of nine States against two. In the revised draft the clause was reported as thus amended. The clause was then altered to its present shape by a vote of ten States against one; and the clause which respects the duty on tonnage was then added by a vote of six States against four, one being divided. So that it seems that a struggle for State powers was constantly maintained with zeal and pertinacity throughout the whole discussion. If there is wisdom and sound policy in restraining the United States from exercising the power of taxation unequally in the States, there is, at least, equal wisdom and policy in restraining the States themselves from the exercise of the same power injuriously to the interests of each other. A petty warfare of regulation is thus prevented, which would rouse resentments and create dissensions, to the ruin of the harmony and amity of the States. The power to enforce their inspection laws is

still retained, subject to the revision and control of Congress; so that sufficient provision is made for the convenient arrangement of their domestic and internal trade, whenever it is not injurious to the general interests. (Idem., sec. 1016.)

"No tax or duty shall be laid on articles exported from any State. (*a*) No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; (*b*) Nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another."

The obvious object of these provisions is to prevent any possibility of applying the power to lay taxes or regulate commerce injuriously to the interests of any one State so as to favor or aid another. If Congress were allowed to lay a duty on exports from any one State, it might unreasonably injure, or even destroy the staple productions or common articles of that State. The inequality of such a tax would be extreme. In some of the States the whole of their means result from agricultural exports. In others a great portion is derived from other sources; from external fisheries, from freights, and from the profits of commerce in its largest extent. The burden of such a tax would, of course, be very unequally distributed. The power is, therefore, wholly taken away to intermeddle with the subject of exports. On the other hand, preferences might be given to the ports of one State, by regulations either of commerce or revenue, which might confer on them

local facilities or privileges in regard to commerce or revenue. And such preferences might be equally fatal, if indirectly given under the milder form of requiring an entry, clearance, or payment of duties, in the ports of any State other than the ports of the State to or from which the vessel was bound. (*Idem*, sec. 1013, 1014.)

IT IS NOT NECESSARY TO RELY UPON "INHERENT POWERS" IN ORDER TO SUSTAIN THE AUTHORITY OF CONGRESS TO GOVERN TERRITORY. THE POWER TO GOVERN TERRITORY IS EXPRESSLY CONFERRED.

It is given without limitation. Subject it may be to general restrictions contained in the Constitution, but these restrictions are not strictly upon the power to govern territory; they are not local in any sense.

Such is the prohibition against creating titles of nobility or the passage of bills of attainder.

There is no reservation of power in the people of the Territories. This reservation is to the people of the States.

The States granted to the Federal Government some powers; others they reserved to themselves or to their people.

On the subject of the government of the territory of the United States the States reserved nothing; they granted the power to make *all* needful rules and regulations respecting it.

The power of Congress over the States is the exact converse of its power over territory.

In legislating for the States, Congress has only the powers expressly or impliedly granted. The States have reserved all other powers.

But in legislating for territory the States have no power. Congress has it all. There is no residuary power left anywhere.

There can be *no government* in a Territory, except by the will of Congress. But States are organized governments which Congress can not destroy, or even interfere with, except in special matters where the States have delegated the power by means of the Constitution.

Congress alone is the judge of what laws for territory are needful. There are no residuary powers.

POWER OF TAXATION.

This power to govern territory, which is so absolutely conferred on Congress, includes the power to tax, either by direct or indirect methods.

Taxation is necessary for the purpose of government.

Revenue must be provided, either by appropriation out of the general treasury or by local assessments, in order to govern any territory.

Therefore tax laws are "needful" as to Porto Rico and the Hawaiian Islands.

The subject we are now inquiring about is taxation. Congress has the power of taxation. That is conceded. Is the power of taxation absolute or limited?

It is absolute in some respects; limited in others.

What are the limitations?

Direct taxes must be apportioned among the several States which compose this Union.

Duties, imposts, and excises must be uniform throughout the United States.

Perhaps the objects *for which* taxes, etc., may be levied are also limited to the payment of the debts, the common defense, and the general welfare.

Are there any other limitations?

I know of none. In all other respects, then, the power of taxation is unrestricted. We might properly say absolute, unlimited, arbitrary.

It would be highly inaccurate, however, to say that it is despotic.

Congress can fix absolutely the subjects of taxation, the rates, the methods of assessment and collection. Its power in these respects is absolute—or equivalent to what counsel for appellants improperly call "despotic;" but it is not unconstitutional.

The question here is whether duties on merchandise, imported into the United States from the insular possessions, or into the islands from the United States, may be constitutionally laid. That they may be so laid is undoubted, unless such a system violates the clause of the Constitution which requires duties to be uniform throughout the United States.

There is no principle of inherent justice or personal rights at stake. It is a pure matter of geographical equality. There is no question of arbitrary or despotic power such as counsel have imagined.

We concede the power must be one exercised under the Constitution. We find the power *in* the Constitution, not outside it, nor beyond it, nor contrary to it.

It is not, in any correct way of speaking, a question of whether the Constitution "extends," or "follows," or "goes;" it is a question of the extent of the power conferred on Congress by the Constitution and how far it is limited by that instrument.

Federal taxation is either general or local.

Local taxes are levied under Article I, section 8, paragraph 1.

Local taxes are for the support of Territorial or non-State governments.

The Porto Rican tariff is of the local kind.

General taxes are of two kinds, *direct;* and what, for brevity, may be called *indirect*, meaning thereby duties, imposts, and excises.

Direct taxes *must* be laid on all the States alike; none may be exempted. They *may be*, but they *need not be*, laid on the territorial possessions.

In the same way we contend that indirect taxes must be uniformly imposed throughout the States which compose the Union; that they may be extended, but do not need to be extended, to the territorial possessions.

The power of Congress to tax the Territories for local purposes is not limited or restricted. Counsel for

appellants would, probably, though improperly, call that a claim of despotic power.

The taxes (using the term in its general significance) authorized to be imposed within the States are Federal taxes. They are imposed within the jurisdiction of the States, which themselves constitute separate and, in some senses, independent and sovereign governments, possessing and required to exercise, for their own internal needs to carry on their own administration, the power of taxation. The power of the States to raise money by taxation for domestic uses does not depend in any way upon the Federal Government. The right of the United States to tax for national purposes property within the limits of the States is a concession made by the States to the General Government.

The concession thus given was guarded by some limitations, and those limitations naturally were only such as the States demanded for their own protection to prevent inequality.

No such condition exists as to territory. The government of territory, whether denominated local or general, is all Federal. All the officers of a Territory are but agents of the General Government. The legislatures of the Territories exercise only delegated powers—are nothing but legislative agents.

In *Gibbons* v. *District of Columbia* (116 U. S., 404) it was declared that the power of Congress, legislating as a local legislature for the District, to levy taxes for District purposes only, in like manner as the legislature

of a State may tax the people of a State for State purposes, was expressly admitted in *Loughborough* v. *Blake*, and has never since been doubted.

"In the exercise of this power Congress, like any State legislature *unrestricted by constitutional provisions*, may at its discretion wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property." (Per Gray, Just.)

If the unrestricted right of local taxation for the support of Territorial governments be, as we submit it is, conceded, then it may be useful to follow the subject further, in order to show how useless such a distinction would be as a corollary to the doctrine which denies the right to lay special taxes for general purposes on Territorial property by means of port duties when carried back and forth between the ports of the United States and the islands.

The laws, the administration, and the revenues of the Territories are subject to the absolute control of Congress.

Congress may repeal the whole form of government existing in a Territory; may destroy the legislature, vacate all the offices, and take over all the public funds and absorb them into the common Treasury. It may appropriate out of the Federal Treasury all the money necessary to carry on a Territorial government, omitting all local taxation. We must not forget that "territory belonging to the United States" is the common property of the United States and is to be administered at the common expense and for the common benefit of the States united, who jointly, as a governing entity, own it.

Porto Rico and the Philippines were not won by arms and taken over by treaty through the efforts or influence or at the expense of the inhabitants, but through the might of the United States, upon their demand and upon their contribution of $20,000,000 to Spain, and upon the assumption by treaty of solemn national obligations which the United States, not the islands or their inhabitants, are bound to observe and keep.

The inhabitants of the islands are not joint partners with the States in the transaction.

The islands are "territory *belonging to* the United States," not a part of the United States. The islands were the things acquired by the treaty; the United States were the party who acquired them, and to whom they belong. The owner and the thing owned are not the same.

It is not a very sensible construction of the Constitution which will forbid Congress to do directly what it will permit it to do indirectly, and yet, if the contention of the appellants is correct, it follows that Congress can not levy import duties on goods taken from the United States into Porto Rico, or vice versa, provided those duties are levied for general purposes, although Congress may levy any kind of a tax it chooses on the *merchandise* after it has been admitted into Porto Rico, provided it be for local purposes, and may then by legislative act take over such taxes into the General Treasury, to be paid out at the pleasure of Congress for general purposes.

Taking into consideration the relation of the Federal Government to territory, the fact that it is the common property of all the States; that the General Government through Congress must support and administer the government of the territory, if it is to have any government; that Congress alone has the power, and the discretion as well, to say whether there shall be any organized government in any particular territory, and what such government, if allowed, shall be, it is necessary to concede the broadest discretion to Congress in determining the means by which and the sources from which the revenue to carry on the government of such territory shall be raised.

In so far as the question of taxation for local territorial purposes is concerned, therefore, it is clear that the express tax clauses of the Constitution are not applicable, and neither the law of apportionment nor of uniformity exists.

The right to tax merchandise in Porto Rico for local purposes existing in Congress, it is immaterial what the merchandise consists of, or where it originated, or who is its owner.

So also it is not perceived that to withhold the levy of the tax until the merchandise is brought into a port of the United States modifies or destroys the power to tax for such local purposes. The tax may be imposed in Porto Rico or held in abeyance until the merchandise reaches a port in the United States when, as a preliminary to its admission (not after its admission), it may be taxed for the support of the government of the islands.

One Territory may be taxed for the support of its local government, while another may be supported wholly from the General Treasury of the United States. In this there would be a technical inequality, but the practical wisdom and justice of it might be universally conceded.

The question would be one of governmental discretion vested in Congress, which neither the States nor the courts of justice are entitled to review.

The legality of the collection of duties on imports from Porto Rico between the date of the evacuation and the date on which the Porto Rico act took effect has been expressly recognized and confirmed by Congress in the act entitled "An act appropriating, for the benefit and government of Porto Rico, revenues collected on importations therefrom since its evacuation by Spain and revenues hereafter collected on such importations under existing law," approved March 24, 1900. Acts of Fifty-sixth Congress, first session, page 51.

This act directs that the amount of customs revenue received on importations by the United States from Porto Rico since the evacuation of Porto Rico by the Spanish forces on the 18th of October, 1898, to the 1st of January, 1900, together with any further customs revenue collected on importations from Porto Rico since the 1st of January, 1900, or that shall hereafter be collected under existing law, shall be placed at the disposal of the President, to be used for the govern-

ment now existing and which may hereafter be established in Porto Rico, and for the aid and relief of the people thereof, and for public education, public works, and other governmental and public purposes therein until otherwise provided by law.

Every provision of the Porto Rico act is for the peculiar and local benefit of the insular government. The revenue is all paid into the insular treasury to be used to support the local establishment created by the act.

A special protective duty on coffee, a product of Porto Rico, is laid for the benefit and encouragement of the coffee growers of the territory.

Upon the point that laws of Congress do not extend in operation to territory unless such extension be expressed in the statute, I desire, in addition to what was said in my brief in the Goetze Case, to add the following additional remarks:

Many instances of legislation show that Congress has always considered something more than the term "United States" to be necessary when it designed a statute to extend to territory.

The internal-revenue laws are one instance.

See especially the act of 1868 (15 Stat., 125), where the word "State" is specifically defined to include a Territory. (Sec. 104.)

Also section 107, where the phrase "the exterior boundaries of the United States" is used in order to include all territory within the geographical limits of this country.

See also section 1891, Revised Statutes. It is to be remarked that this section refers only to organized territories, and not to one organized territory.

Section 2145, Revised Statutes, extends criminal statutes to the Indian country, which would not be necessary if criminal statutes extended there of their own force.

Thomas H. Benton, for thirty years a Senator from Missouri, was as able and distinguished a statesman as the territory included in the Louisiana purchase has ever produced. His views on the general question under discussion were strong and positive; his long service in the National Legislature, his familiarity with the course of public events, increased to an unusual degree by his practice of recording for publication the incidents of political and legislative discussion, his great ability as a constitutional lawyer, and his patriotic devotion to the best interests of our country, render his opinions and statements of superlative value. Some of his expressions concerning the subject of the extension of the Constitution to the Territories were quoted in the brief of the United States in the Goetze and Pepke cases. Still more remarkable passages, evincing the same views which the Government's counsel have maintained in these arguments, are found in a little book put forth by Mr. Benton in 1857, entitled "Historical and Legal Examination of the Dred Scott Case."

Referring to the history of the formation of the Constitution, he says:

> Who were the parties to it? The States alone. Their delegates framed it in the Federal convention; their citizens adopted it in the State conventions. The Northwest Territory was then in existence, and had been for three years; yet it had no voice, either in the framing or adopting of the instrument—no delegate at Philadelphia, no submission of it to their will for adoption. The preamble shows it was made by States and for States. Territories are not alluded to in it. The body of the instrument shows the same thing, every clause, except one, being for States; and Territories, as political entities, never mentioned once; and the word "territory," occurring but once, and that as property, assimilated to other property—as land, in fact, and as a thing to be disposed of—to be sold. Now, you never sell a Territorial government, but you sell property; and in that sense alone does the word "Territory" occur, and that but once in the whole instrument. Tried by the practice under it, and the Territory is a subject, without a political right—no right to vote for President or Vice-President, or Senator, or Representative in Congress; nor even to vote through their Delegate on any question in Congress—all their officers appointable and removable by the Federal authority, even their judges—their territory to be cut up as Congress pleases; even parts of it to be given to Indians; no political rights under it, except as specially

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granted by Congress; no benefit from any act of Congress, except specially named in it, or the act specially extended to them, like the subject colonies and dependencies of Great Britain. How can the Constitution go to them of itself, when no act of Congress under it can go to them unless specially extended? Far from embracing these Territories, the Constitution ignores them, and even refuses to recognize their existence where it would seem to be necessary—as in the case of fugitive from service and from labor. Look at the clause. It only applies to States—fugitives from States to States.[1] Why? Because the ordinance of 1787, the organic law of the Territories, made that provision for the Territories, and about in the same words, and before it was put in the Constitution.[2] In both places it is an organic provision, barren of execution until a law should be passed under it to give it effect—which was done in the fugitive-slave and criminal act of 1793, that act applying to Territories as well as to States, and so carrying both the Constitution and the ordinance into effect (p. 26).

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[1] "No person held to service or labor in one *State*, under the laws thereof, and escaping into *another*, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on the claim of the party to whom such service or labor may be due."—(Article 4, sec. 2.)

[2] "Provided, always, that any person escaping into the same (the Northwest Territory) from whom labor or service is lawfully claimed in any one of the original *States*, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service, as aforesaid."—(Ordinance of 1887, art. 6.)

The whole Constitution was carried out upon the principle of ignoring the existence of Territories. I speak of Territories, implying political existence and organization, in contradistinction to territory signifying land, and repeat that, as political entities, the Constitution ignores them. This may be seen in every clause—strongly in the two instances just given and in those previously given, and still more strongly in the article which relates to the establishment of courts. If there is one branch of the Government which, above all others and more than all others, concerns the whole body of the community, it is the judicial department. The administration of justice, civilly and criminally, may reach every individual of a country. No age or sex, no rank, no condition of rich or poor, no conduct—not even that of virtue and merit itself—is secure from litigious involvement. The first care of the organic legislating power is to give a judiciary to the people; and this is what our Constitution has carefully done, as far as our system of government required its action. It has provided for the trial of all cases which could invoke the Federal authority—all between citizens of different States, and between citizens and foreigners, and for all cases arising under the Federal laws—all cases, in short, which were not left to the State courts—so that between the two systems the citizens should have a remedy for every wrong. Did this extend to the Territories? Not at all! The Federal judiciary system does not reach them, nor the State systems either. What then? Are they without courts? By no means. Con-

gress supplies them, and in a way to show that they do not do it under the Federal Constitution, or in conformity to any State constitution known in our America. They made judges to hold office for a term of years, *subject to be removed by the President, like any common office-holder*, and several have been so removed; and they gave codes of law, both civil and criminal, not only over the organized Territories reduced to our possession, but over the wild territory still in the hands of the Indians. By the decision of the Supreme Court this would seem to be unconstitutional and void, a consequence which seemed to sit hard on one of the brother justices who had acted under these laws, and who, while agreeing in the decision upon the Missouri compromise act, did it for a different reason from that which would have condemned his own action.[1] Certainly all this legislation was incompatible with the Constitution, but no violation of it, because the Constitution did not reach these Territories, either civilized or savage.

Referring to the act for the government of the Louisiana territory, Mr. Benton declared:

> The bill thus passed received the approbation of the President the same day it was laid before

[1] "It is due to myself to say that it is asking much of a judge, who has for nearly twenty years been exercising jurisdiction, from the western Missouri line to the Rocky Mountains, and, on this understanding of the Constitution, inflicting the extreme penalty of death for crimes committed where the direct legislation of Congress was the only rule, to agree that he has been all the while acting in mistake, and as an usurper."—(Mr. Justice Catron.)

him; and to those who are acquainted with the working of the legislative machinery, it may well be believed that the whole proceeding was in concert with the Administration; that Mr. Jefferson picked out Mr. Breckenridge to bring in the bill; that its principles were settled in Cabinet meeting; that Mr. Madison drew it, and that every question in relation to it was duly considered before it was submitted to final action. And thus, this first instance of Congress legislation upon newly acquired territory was as high an instance of disregard of the Constitution as the imagination could conceive, being nothing less than the continuation of the Spanish regal despotism; the President taking the place of the King of Spain; Governor Claiborne the place of the intendant-general, Morales; the laws of Spain remaining in force and administered by American judges, and the whole provincial administration going on as if no change of government had taken place. It was a royal despotic government, and everybody knew it, and no one thought of testing it by the Constitution (some few new members in the House excepted) than by the Koran (p. 60).

And now for the men who passed these acts—who established these governments—so incompatible with the Constitution and so fully asserting absolute power over this new territory. Who were they? They were the men of the Revolution—of the ordinance of 1787—of the Constitution of that year—of the first administration of the Federal Government in its early age—and the authors of the acquisition of Louisiana. Mr. Jefferson was President,

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Mr. Madison Secretary of State, and the two Houses of Congress filled with men who had acted their good part in founding and in putting into operation the new Federal Government. These were the men who did these things and who ought to be allowed to know something of their own work; and, if they did not, somebody existing at the time ought to have known of their dreadful usurpations and proclaimed them to the world. No such discovery was made (p. 69).

Speaking of the doctrine of the *proprio vigore* extension of the Constitution to territory, Mr Benton said:

Mr. Calhoun declared its effect when he proclaimed it, saying:

"I deny that the laws of Mexico can have the effect attributed to them (that of keeping slavery out of New Mexico and California). As soon as the treaty between the two countries is ratified, the sovereignty and authority of Mexico in the territory acquired by it becomes extinct, and that of the United States is substituted in its place, conveying the Constitution with its overriding control over all the laws and institutions of Mexico inconsistent with it." (Oregon Debate, 1848.)

This is the declared effect of the transmigration of the Constitution to free territory by the author of the doctrine; and great is the extent of country, either acquired or to be acquired, in which the doctrine is to have application. All New Mexico and California at the time it was broached; all the Territories now held,

wherever situated, and as much as can be added to them—these additions have already been considerable, and vast and varied accessions are still expected. Arizona has been acquired; fifty millions were offered to Mexico for her northern half, to include Monterey and Saltillo; a vast sum is now offered for Sonora and Sinaloa, down to Guaymas; Tehuantepec, Nicaragua, Panama, Darien, the Spanish part of Santo Domingo, Cuba, with islands on both sides of the tropical continent. Nor do we stop at the two Americas, their coasts, and islands, extensive as they are, but circumvolving the terraqueous globe, we look wistfully at the Sandwich Islands, and on some gem in the Polynesian group, and plunging to the antipodes pounce down upon Formosa in the China Sea. Such were the schemes of the last Administration, and must continue, if its policy should continue. Over all these provinces, isthmuses, islands, and ports, now free, our Constitution must spread (if we acquire them, and the decision of the Supreme Court stands), overriding and overruling all antislavery law in their respective limits, and planting African slavery in its place, beyond the power of Congress or the people there to prevent it (p. 29).

THE INTERNAL-REVENUE LAWS HAVE NOT BEEN HERETOFORE UNIVERSAL IN APPLICATION.

Internal duties: Under the Constitution the internal-revenue laws should be as universal and uniform in

application as the tariff laws. Were they framed for universal application, and have they been so applied?

The first internal-revenue tax was on spirits distilled in the United States, and was levied by the act of March 3, 1791, which, for purposes of collection, provided "that the United States shall be divided into fourteen districts, each consisting of one State" (1 U. S. Stat., sec. 4, pp. 199, 200). That act provided (secs. 14 and 15) that duties should be paid upon all spirits distilled "within the United States," but no provision was made for the collection of the tax in the territory not included in the boundaries of the existing fourteen States. Other instructive phrases of that act are as follows (secs. 53, 55): "Without the limits of the United States;" "relanded in any other part of the same;" "within the limits of any part of the United States."

The following acts, June 5, 1794, as to carriages, and of the same date as to retail liquor licenses (id. 373, 376), although imposing a tax upon "all carriages for the conveyance of persons" and upon "every person who shall deal in the selling of wines," respectively, provided for collection only in the districts created by the act of 1791. Another act of the same date (id. 378) expressly extends the tax on distilled spirits and stills to "the territories northwest and south of the river Ohio" by authorizing the President to erect new districts and appoint the necessary officers in that region; and still another act of that date laid a duty upon snuff and refined sugar "manufactured or made

in the United States," without any indication that the extension of the distilled-spirits tax over the northwest territory should also cover these additional articles. Similarly the act of June 9, 1794 (id. 397), imposing duties on property sold at auction, refers seemingly to the "several supervisors of the revenue" and the "respective districts" in the fourteen States only. These duties, along with the tax on stamped paper (act of July 6, 1797, 1 Stat., 527), in which the phrase "throughout the United States" is used, were altered, amended, or repealed, and later reenacted by various acts, in the interval before the whole body of internal-revenue laws was repealed in 1817; but the entire course of legislation shows that the taxes were not applied outside the States included in the original act or those subsequently admitted, unless the tax laws were expressly extended to the Territories of the United States. Thus, the act of July 11, 1798 (1 Stat., 591), fixed the compensation of officers employed in collecting the internal revenues, but mentions no districts except those in the sixteen States then forming the Union. But, consistently with the extension of the distilled spirits tax to the Northwest Territory, it appears that there was a supervisor of revenue in that district whose compensation was fixed by section 4 of the act of April 6, 1802 (2 Stat., 148).

By the act of July 22, 1813 (3 Stat., 22), the collection of direct taxes and internal duties was jointly regulated, and no provision was made for the collection of either species of tax outside the eighteen States

at that time. The last section of that act, requiring separate accounts of the direct taxes and internal duties to be kept, indicates that the only sums received were those received from "each State" as enumerated in the beginning of the act.

The act of August 2, 1813, with the previous acts therein referred to (3 Stat., 82, and note *a*), reenacted the various internal duties which had previously been abolished, and charged the collectors appointed under the acts, *supra*, erecting the various collection districts in the States, with the collection of the duties imposed, and by section 2 expressly authorized the President "to divide respectively the several Territories of the United States and the District of Columbia" into convenient districts for the purpose of collecting the internal duties specified and to appoint collectors, thus for the first time extending these laws generally and comprehensively to the territory of the United States outside the limits of the States; and that act provided (sec. 3) that the several duties "shall be laid and collected in the several Territories of the United States and in the District of Columbia in the same manner and under the same penalties" as in the "districts" of the old and reenacted laws, that is, in the States; and extended the existing acts to the "several Territories of the United States and to the District of Columbia." In other sections of that act and throughout the later acts such phrases as "within the several Territories of the United States and the District of Columbia" and "within the United States or Territories thereof" constantly appear. (*Vide* act

December 21, 1814, 3 Stat., 152; act January 18, 1815, id., 180.)

The internal-revenue law of July 1, 1862 (12 Stat., 432), which was the basis of all the succeeding laws amending its provisions or supplying new provisions, provided "that the States *and Territories of the United States* and the District of Columbia" should be divided into convenient collection districts, and "*within the United States or Territories thereof*" and "*of the United States or Territories*" (e. g., secs. 75, 82) are the phrases used to describe or locate the persons or property subject to tax.

The most important subsequent acts are those of March 3, 1863 (12 Stat., 713); March 7, 1864 (13 Stat., 14); June 30, 1864 (id., 223), which was a new general act supplanting the act of 1862, of which section 46 provided for the execution of the law "in a State or Territory of the United States or any part thereof, or within the District of Columbia," as soon as the authority of the United States therein shall be reestablished, if, for any cause, the laws could not be executed therein; and the last section, carried into the Revised Statutes as section 3140, provided that wherever the word "State" is used in the act, it shall be construed to include the Territories and the District of Columbia where such construction is necessary to carry out the provisions of the act. The act of July 13, 1866 (14 Stat., 98), was also a general law and largely reduced the duties; and the act of July 20, 1868 (15 Stat., 125), made new provisions for the taxation of

distilled spirits and tobacco. Section 104 of this act also construed the word "State" as including a Territory and the District of Columbia, and section 107 provided that the internal-revenue laws imposing taxes upon *distilled spirits, fermented liquors, tobacco, snuff, and cigars* shall be held and construed to extend to such articles produced *within the exterior boundaries of the United States*, whether within a collection district or not. The latter section was construed by the court in the *Cherokee Tobacco Case* (11 Wall., 616), which determined that the section "extends the revenue laws over the Indian Territories only as to liquors and tobacco. In all other respects the Indians in those territories are exempt." The dissenting opinion held that "it was not the intention of Congress to extend the internal-revenue law to the Indian Territory; that Territory is an exempt jurisdiction," partly on the ground that the express and special privilege given to the Cherokees by the treaty of 1866 was not repealed by the subsequent general law, and partly on the ground that the language of section 107 could be applied to territory within the exterior boundaries of the United States without embracing the Indian Territory, to wit, to the Territory of Alaska. It was not suggested in the court below (*United States* v. *Tobacco Factory*, 1 Dill., 264; Fed. Cas. No. 16528) nor in the Supreme Court that without express provision by Congress these laws would extend to the Territories, because, being taxes or duties, they must constitutionally "be uniform throughout the United States." The debates in Congress show

that section 107 was offered as an amendment or addition to the act in the Senate by Mr. Sherman, and was adopted without explanation or debate. (Cong. Globe, part 4, 2d session, 40th Cong., 1867–68, p. 3779.)

It is to be noticed that the act of 1868, *supra*, section 55, and the act of June 6, 1872 (18 Stat., 230), amending the same (sec. 12), in making it a misdemeanor intentionally to reland distilled spirits shipped for exportation used the phrase "within the jurisdiction of the United States."

Beginning with the passage of the act of July 14, 1870 (16 Stat., 256), the large list of internal-revenue taxes was gradually reduced until the enactment of the war-revenue act of 1898, the language of which adds no specially significant phrase to the former legislation, although the construction given to it in *Knowlton* v. *Moore* (*post*) confirms our contention as to the purpose and scope of the rule of uniformity.

Direct taxes: Direct taxes do not, perhaps, present a close analogy, being imposed by the rule of apportionment "among the several States according to their respective numbers." The States and their respective quotas were necessarily specified in such laws, and there were no general expressions to render doubtful the divisions of territory in which direct taxes were intended to be laid. It is worthy of remark, however, that if the duties which are to be "uniform throughout the United States" must also apply universally throughout acquired and dependent territory, then quite as clearly must be applied universally the direct taxes which are to be "apportioned among the several States."

The uniform-duties clause and the direct-tax provisions both show the scrupulous care of the framers of the Constitution for equality among the States, and neither rule looks beyond the States to apply a fixed and self-acting ordinance to regions which the future might annex, but were not then in the States, nor under the definite compact recognized by the Constitution as to the Northwest Territory.

How has Congress construed their power and function relative to direct taxes? The act of 1798 (1 Stat., 580) provided for valuations in the States, but not in the Northwest Territory, although this coterminous region was recognized as intimately connected territory of the United States, or even as a portion thereof, under the Constitution. So also the similar act of 1813 provided (3 Stat., 22), and the direct taxes of 1813 and 1815 (id., 53, 164) were so laid. On the other hand, a direct tax was expressly imposed by Congress in the District of Columbia by the act of 1815 (3 Stat, 216), which was before the court in *Loughborough* v. *Blake*, *infra*. The enactment itself is proof that the interposition of Congress was conceived to be necessary, not only to provide the collecting machinery in the District, but also to carry the constitutional provisions beyond the limits of the States in "laying a direct tax upon the United States." And the decision simply determined that Congress had this power.

The direct tax of 1861 (12 Stat., 292) was specifically apportioned among the existing States, *Territories*, and the District of Columbia, and although the income tax imposed by the forty-ninth section of that act

was levied upon the annual income of "every person residing in the United States," Congress was careful in subsequent sections to provide the machinery for the assessment and collection of that tax, not by any general phrase such as "throughout the United States," but "in each of the States and Territories of the United States, and in the District of Columbia."

The census acts, upon which the direct-tax laws are based, show that in 1790 (1 Stat., 101) the marshals of the several districts (each one of the fourteen States then constituting a judicial district) were directed to take the enumeration. In 1800 (2 Stat., 11) the direction was given to the marshals of the several districts and the secretaries of the Northwest Territory and the Mississippi Territory. In 1810 (id., 564) the marshal of the District of Columbia and the secretaries of the additional territories were added. In 1820 (3 Stat., 548), marshals having then been provided for the Territories, those officers alone were specified, and so the law continued for several decades, the act of 1850 (9 Stat., 428) providing the machinery under which the subsequent censuses were taken until the establishment of the Census Office by the act of March 3, 1879 (20 Stat., 473), which regulated the taking of the census "within each State or Territory."

Thus, while Congress has provided throughout the United States and its Territories for the enumeration upon which direct taxes have been apportioned, except in 1790, when, indeed, the Northwest Territory was in large part wild and unoccupied, but little more so than

some of the States, it never seems to have been supposed that such taxes must be levied beyond the States or apportioned to the Territories unless Congress saw fit so to provide.

ALASKA.

In 1868 the customs, commerce, and navigation laws were extended over Alaska (Rev. Stat., sec. 1954), but not the internal-revenue laws, except so for as section 107 of the act of July 20, 1868, had that effect. Nor was any further change made in this respect by the act of 1884 (23 Stat., 24), which provided a civil government for Alaska but not fully organized Territorial government, under which civil status the act of March 3, 1899 (30 Stat., 1253), gives to the "district of Alaska" (meaning, doubtless, the judicial district) a code of criminal procedure. Section 477 of this act recognizes the wide application of the taxes on intoxicating liquors and impliedly directs their enforcement in Alaska as follows: "That nothing in this act shall in any way repeal, conflict, or interfere with the public general laws of the United States imposing taxes on the manufacture and sale of intoxicating liquors, for the purpose of revenue, and known as the 'internal-revenue laws.'" In practice, internal-revenue duties have been collected in Alaska upon liquors and tobacco since December, 1872, when the Territory was added to the internal-revenue district of Oregon by Executive order under the authority of sections 103 and 107 of the act of 1868, *supra*, for which action the laws embodied in section 3141, Revised Statutes, would also give authority.

So far as the internal-revenue records show, it seems that internal duties have in the past been collected in Alaska and the Indian Territory only upon the articles subjected to tax by section 107 of the act of 1868; for which, perhaps, a practical reason also might be given, namely, that in the conditions prevailing in those Territories for a long period after 1868 no articles were produced subject to tax except those named in section 107, other such articles entering those districts tax paid.

OKLAHOMA.

A point was made on the former argument as to the sources from which the Government has acquired this Territory.

The "Indian country," defined in the act of June 30, 1834 (4 Stat., 729), and described in *United States* v. *42 Gallons of Whisky* (93 U. S., 188), and *Bates* v. *Clark* (95 U. S., 204), was narrowed under advancing civilization and by successive treaties which extinguished the Indian titles, and at the time of the adoption of the Revised Statutes, comprised the region known as the Indian Territory, the somewhat indefinite boundaries of which had been gradually defined as new States and Territories, were erected. The previous laws, preserved in chapter 4 of Title XXVIII of the Revised Statutes, were applied to its government, and it was itself definitely bounded by the act of March 1, 1889

(25 Stat., 783; 1 Supp. R. S., 670, and note). By the act of May 2, 1890, the Territory of Oklahoma was erected and organized, and the limits defined to include a certain portion of the Indian Territory and the "Public Land Strip," with a provision for incorporating into the Territory the unoccupied portion of the "Cherokee Outlet," and lands remaining in the Indian Territory, whenever the respective Indian tribal owners should assent.

A question of long standing between the United States and Texas as to the title to what was known as "Greer County" being involved in that act, the dispute was settled by the decision in *United States* v. *Texas* (162 U. S., 1), which held that the title to that portion of Oklahoma Territory was in the United States, and that the tract had been acquired by the United States under the treaty with Spain of 1819. It is manifest from the reasoning of the opinion in that case and the authorities cited, and especially from the compromise act of September 9, 1850 (9 Stat., 446), by which the northern and western boundaries of Texas were defined, and all territory claimed by her exterior to said boundaries was relinquished, that all the land now included in the Territory of Oklahoma had been claimed by the United States against Spain and her successors in title and sovereignty, Mexico and Texas, as under the Louisiana purchase, and that the Territory of Oklahoma as now constituted was necessarily embraced either in the Louisiana purchase or under the treaty of 1819 with Spain, or under the cession of

territory by Texas in 1850. All of this country lies far east of the cession by Mexico in 1848, and there seems to be no doubt that the entire territory was included in the Louisiana purchase, excepting the portion decided by *United States* v. *Texas* to have been acquired under the treaty with Spain, and excepting the "Public Land Strip," which apparently was part of the territory claimed by Texas exterior to her boundaries as settled, which she surrendered in 1850. It is evident that in one of these ways all of the Indian Territory and Oklahoma must have been acquired, since the three acquisitions in question (whatever may have been the variations in boundary lines and surveys) taken together covered the whole of that country. See "The Louisiana Purchase" by the present Commissioner of the General Land Office, pages 36, 39. The passage on page 36 says that the Louisiana purchase proper embraces * * * "all of the Indian Territory and *part* of Oklahoma Territory." It is learned from the Land Office that the only parts of Oklahoma Territory not included in the Louisiana purchase are those here stated to have been acquired under the treaty with Spain or through the cession by Texas.

The Indian Territory was added to the internal-revenue district of Kansas August 8, 1881, in the same way as Alaska was added to the district of Oregon; and Oklahoma, since its separation from the Indian Territory, remains in the Kansas district.

We have seen that the one hundred and seventh section of the internal-revenue act of July 20, 1868, was

construed in the Cherokee tobacco case to carry the internal-revenue laws as to distilled spirits, fermented liquors, tobacco, snuff, and cigars to the Indian Territory as then constituted. The Oklahoma act of 1890 contains (sec. 28) a provision generally applied in express terms to all the Territories as they are organized, namely, "That the Constitution and all the laws of the United States not locally inapplicable, except so far as modified by this act, have the same force and effect as elsewhere within the United States." This is in accordance with section 1891 of the Revised Statutes, which applies this provision to "all the organized Territories and in every Territory hereafter organized as elsewhere within the United States." It is evident that the internal-revenue laws are not inapplicable in an organized Territory, and such provisions, taken in connection with the authority conferred upon the President by section 3141, Revised Statutes, are the ground upon which all the internal-revenue laws are executed in the organized Territories; while section 107 of the act of 1868, *supra*, is the original basis for collecting the tax upon distilled spirits, fermented liquors, tobacco, snuff, and cigars in the Territory of Alaska, thus far not fully organized in the legal sense, to which, however, the act of 1899 extended the taxes on intoxicating liquors.

It seems that in practice at the present time taxes accruing under the war-revenue act, as well as all internal-revenue taxes, are collected in Alaska and the Indian Territory. This practice is based partly on

section 107 (*ante*), reenacted as section 3448, Revised Statutes, and, as to Alaska, under the act of 1899 (*supra*), and partly on the ruling of the internal-revenue authorities that these laws operate with respect to Alaska so as to subject to stamp tax articles not produced in the Territory but destined for consumption there. The practice means no more than that now, as in former years, the growth and manufacture of tobacco and production of spirits in the Indian Territory and the sale of these articles in Alaska are properly made to bear their burdens under the law; and substantially that other articles subject to tax before the war-revenue act of 1898 are not produced in those Territories, but must enter them correctly stamped or tax paid. And taxes are levied there under the latter act because its language, construed in the light of its evident purpose and spirit, has been held by the Treasury Department to carry its provisions over those two Territories.

HAWAII, PORTO RICO.

On this review of the status of the Territories in respect to the internal-revenue laws, and of the varying action by Congress under different circumstances—always in strict conformity to the doctrine that these laws do not, without special provision, of themselves or by force of the Constitution, apply to the Territorial possessions or dominion of the United States—it is logical and consistent to find Congress recognizing in the Alaska act of 1899, as above shown, the validity of the internal duties of most general importance, as

previously extended there and established in practice; providing that the Constitution and, with certain exceptions, the laws of the United States shall have equal force and effect in Hawaii, and that the Territory shall constitute an internal-revenue district (secs. 5, 87, act of April 30, 1900, 31 Stat., 141); and recognizing in section 3 of the act of April 12, 1900 (id., 77), the internal-revenue taxes of Porto Rico, and in section 14 excepting our internal-revenue laws from those statutes of the United States which are to have the same force and effect in Porto Rico as in the United States.

Thus, finally, in the case of the internal-revenue laws to a striking degree, and also in the case of the direct-tax laws—a somewhat analogous instance—*Congress has uniformly and specifically legislated for the Territory or Territories of the United States whenever it was their intention to execute those laws beyond the limits of the States;* and the only case in which their action has been challenged or questioned was the Cherokee tobacco case, wherein the legislation was resisted, not on grounds which drew in question the constitutional authority of Congress as now presented, but simply because the Indian treaty established a lawful exemption which, it was claimed, had not been repealed by Congress. Administrative practice, dealing through a long period of time with many novel, different, and peculiar conditions, has followed this view of the matter with substantial consistency; and no decisions on these laws can be found in which the soundness of the Government view is doubted or controverted, much less overthrown.

Counsel for Armstrong contend that the term "United States" means the United States Government, composed of States and outlying territories and embracing the people residing in both the States and outlying territories (p. 33).

In this contention they entirely disregard the fact that the term "United States" is used sometimes in a geographical sense, sometimes in a sense describing the governing entity, and sometimes as describing the States of the Union.

It is also asserted that the theory of our Government is that duties are to be levied and collected upon the products of foreign countries. "Until now whoever dreamed that we could collect duties upon our own people."

The States, in the days of the Confederation, levied duties upon goods brought from one State into another. The States are still denominated foreign so far as the judgments of their courts are concerned.

The quality of "foreign," in connection with tariff laws, is one inserted only by the statute. Great Britain always imposed duties on merchandise brought into her home ports from the colonies, and does so now. Many of her colonies impose duties *ad libitum* upon imports from the home country.

The question is not one of domestic and of foreign ports, but one relating to the States and to Territories, the former being the constituent parts of the Union and the latter being territory belonging to the United States.

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On page 47 of their brief counsel make the astonishing statement that for nearly one hundred years no distinction has been made between that part of the national domain which was States and that which was Territories. The direct opposite of this is the truth, as shown by the history of our Government, its legislation, and its judicial decisions.

Counsel assert that the President of the United States has no right to exercise legislative function. If by this is meant that he is not a legislative branch of the Government within the meaning of the Constitution, no fault can be found with the doctrine. It is too elementary to be even alluded to. But when as commander in chief he exercises government over conquered territory, he has, by the undoubted law of nations, the right not only to govern but to make laws for the territory so occupied. The legislative functions thus exercised are not a part of the legislative power conferred by the Constitution upon Congress, and have no relation to it. They are merely incidents under the public law of belligerent right, vested by the Constitution in the President as Commander in Chief of the Army and navy. They are not unconstitutional, but are exercised by virtue of the Constitution, not by any express clause which confers them, but are implied in the functions and duties of the commander in chief. Such legislative functions are not national, but local and peculiar, and relate only to the particular extent of country occupied by the military forces. This doctrine is so well understood and has been so frequently

asserted, both by the executive and by the courts, that citation seems hardly necessary. I refer especially to what was said on this subject in my brief in the Goetze case (p. 117, etc.), and what was said by this court in the case of *Cross* v. *Harrison* (16 Howard, 164).

In that case, speaking of the continuance of the temporary government of California and New Mexico, the court said:

> It had been instituted during the war by the command of the President of the United States. It was the government when the territory was ceded as a conquest and it did not cease, as a matter of course or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress might have put an end to it, but that was not done. The right inference from the inaction of both is that it was meant to be continued until it had been legislatively changed. No presumption of a contrary intention can be made. Whatever may have been the causes of delay, it must be presumed that the delay was consistent with the true policy of the Government.

This claim of counsel for the appellant would be subversive and destructive of every vestige of organized government set up and sustained in the Philippine Islands from the time of our occupation of Manila until the present time, notwithstanding Congress has permitted the executive department to continue in the administration of the government of those islands without interference or action on its part.

TARIFF AND REVENUE LAWS OF THE UNITED STATES DO NOT TAKE EFFECT IN CEDED TERRITORY IMMEDIATELY UPON THE RATIFICATION OF THE TREATY OF CESSION.

Counsel for appellants contend that immediately on the ratification of the treaty with Spain, and immediately upon the approval of the resolution annexing the Hawaiian Islands as territory of the United States, the tariff laws of the United States became operative in the territories thus acquired.

Such a construction of the law and Constitution could not be made without grave prejudice to the United States, and ought not to be made unless the Constitution clearly and unmistakably requires it. Such a construction would overrule the direct provisions of Congress in the Hawaiian act, and the manifest purpose of the President and the Senate in negotiating the Paris treaty.

It is not to be credited that the founders of the Government intended the Constitution and laws of the United States to have such absolute and inconvenient application.

There must be in the nature of things a time between the deed of acquisition and the assumption by the United States of the full government of acquired territory when the relation between the Federal Government and the acquired territory will be inchoate. In these particular cases, when the treaty was ratified and the Hawaiian resolution approved, there were no collection districts, no revenue officers, no provision for turning over the proceeds of the revenue to the

the General Treasury, no means of enforcing the criminal laws passed to punish frauds upon the revenue, or anything, in fact, to enforce to the slightest extent the rights of the Government, or the provisons of the law, which, it is contended, nevertheless extended to the new possessions. Neither Porto Rico nor the Philippine Islands were possessed at the time of their acquisition of any autonomous government of their own after the Spanish sovereignty was eliminated. They were incapable of levying or collecting taxes for their own support.

There might be cases of the acquisition of territory which possess no organized form of government whatsoever, not even of a local or municipal kind. Whether such territory should have any local government would depend entirely upon the will of Congress; the contention of the appellants would create the absurd necessity of having acts of Congress as to revenue and other matters extended in theory through tracts of country in which they were utterly incapable of enforcement, all the agencies of government being absent.

It could never have been contended that such a condition of theoretical law and practical anarchy should arise.

Cross v. *Harrison* is authority against the position of appellants on this point.

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